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BEFORE THE ARIZONA CORPORATION COMMISSION

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COMMISSIONERS

MARC SPITZER, Chairman
WILLIAM A. MUNDELL
JEFF HATCH-MILLER
MIKE GLEASON
KRISTIN K. MAYES

In the matter of:

YUCATAN RESORTS, INC.,
3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
Cancun, Q. Roo
Mexico C.P. 77500

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3222 Mishawaka Avenue.
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
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RESORT HOLDINGS INTERNATIONAL, INC.,
3222 Mishawaka Avenue
South Bend, IN 46615;
P.O. Box 2661
South Bend, IN 46680;
Av. Coba #82 Lote 10, 3er. Piso
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DOCKET NO. S-03539A-03-0000

**SECURITIES DIVISION'S
RESPONSE TO RESPONDENTS'
JOINT MOTION TO STRIKE**

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 Mexico C.P. 77500

MICHAEL E. KELLY and LORY KELLY,
 husband and wife,
 29294 Quinn Road
 North Liberty, IN 46554;
 3222 Mishawaka Avenue
 South Bend, IN 46615;
 P.O. Box 2661
 South Bend, IN 46680,

Respondents.

The Securities Division of the Arizona Corporation Commission ("Division") hereby responds to the Respondents' Joint Motion to Strike the Securities Division's Reply to Respondents' Joint Motion to Compel or, Alternatively, Vacate the Temporary Order to Cease and Desist ("Motion to Strike"). In short, Respondents' Motion to Strike urges a result that would be wholly at odds with the spirit of the Rules of Practice and Procedure before the Corporation Commission: that the Commission rules shall be liberally construed when not contrary to the substantial interests of the parties. Accordingly, Respondents' Motion to Strike -- a gratuitous call for form over substance -- should be denied.

Background

On March 5, 2004, in accordance with the directives of the presiding Administrative Law Judge, the Division filed separate objections to four of respondents' improper discovery demands. Respondents chose not to counter with appropriately captioned "Responses" to these objections, but instead submitted "Respondents' Joint Motion to Compel or, Alternatively, To Vacate the Temporary

1 Order to Cease and Desist.” The semi-responsive nature of this filing became apparent only after a
2 careful review of the document’s contents.

3 In making such a filing, Respondents effectively submitted a hybrid: a response to the
4 Division’s discovery objections and a separate motion to vacate the pending Temporary Order to
5 Cease and Desist. This muddled submission forced the Division to at once *reply* to Respondents’
6 discovery response and *respond* to the Respondents’ motion to vacate. The Division consequently
7 drafted an aptly titled “Securities Division’s Response [Effectively Reply] to Respondents’ Joint
8 Motion to Compel or, alternatively, to Vacate the Temporary Order to cease and Desist”
9 (“Response/Reply”). The unusual character of this Response/Reply naturally defied any set filing
10 timeframe.

11 ***Discussion***

12 The Respondents’ demand to strike the Division’s Response/Reply is unfounded on many
13 levels. Instantly, the basis for Respondents’ Motion to Strike, Rule 12(f) of the Arizona Rules of
14 Civil Procedure, is specifically designed for *pleadings* – not responsive motions.¹ Moreover, the
15 Rules of Practice and Procedure before the Corporation Commission (“Commission Rules”) require a
16 liberal construction. Indeed, the Commission Rules explicitly allow the presiding administrative law
17 judge to waive rules when such a waiver does not affect the substantial interests of the parties.
18 *Arizona Administrative Code, R14-3-101(B)*. In this instance, the substantial interests of the
19 Respondents are clearly unaffected by the filing date of the Division’s Response/Reply submission.
20 This point is particularly salient in light of the ambiguity surrounding the actual due date for the
21 Division’s (forced) combination response/rebuttal.

22 Courts are equally receptive to liberal construction principles in the case of interpreting
23 procedural rules. For instance, in the matter of *Martinez v. Binsfield*, 195 Ariz. 446 (App.1999),
24 *vacated on other grounds*, 196 Ariz. 466 (2000), the court recognized that a liberal construction of
25

26 ¹ See Rule 12, Arizona Rules of Civil Procedure

1 the civil rules governing motions is appropriate and that, "in the absence of a showing of prejudice,
2 *the substance of a motion rather than its form* will usually be considered." *Id.* at 448, citing Jeremy
3 C. Moore et al., "Moore's Federal Practice," §7.03[4][a] at 7-16 (3rd ed. 1998)(*emphasis added*).
4 This principle is directly applicable to the present circumstance. A prior filing necessitated the
5 Division to file an atypical response and reply that in no way compromised Respondents' substantial
6 interests. The substance of the Division's Response/Reply, and not its technical classification
7 (whatever that may be), is what ultimately should be considered.

8 **Conclusion**

9 Respondents' Motion to Strike is groundless under the circumstances. The purpose of motion
10 "due dates" is to move matters along in an efficient manner while simultaneously protecting the
11 rights of the parties. Where no party would be prejudiced, the rules should be liberally construed to
12 allow for a just and speedy determination. Rather than furthering this goal, Respondents are
13 attempting to bog down these proceedings by filing yet another frivolous motion.

14 The Division's Response/Reply should be judged on its content, not on some ambiguous and
15 innocuous filing date. It follows that Respondents' Motion to Strike should be denied.

16 RESPECTFULLY SUBMITTED this 26th day of April, 2004.

17
18
19 By 

20 Jamie B. Palfai

21 Attorney for the Securities Division of the
22 Arizona Corporation Commission

23 ORIGINAL AND THIRTEEN (13) COPIES of the foregoing
24 filed this 26th day of April, 2004, with

25 Docket Control
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1 COPY of the foregoing hand-delivered this
2 26th day of April, 2004, to:

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7 COPY of the foregoing mailed
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